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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Kirsti F. Curtis, Circuit Court Judge

Supreme Court Appellate Case No. 2025-002122
Court of Appeals Appellate Case No. 2023-000569
Case No. 2019-CP-26-07075

Meswaet Abel, as Personal Representative of the Estate of Zerihun Wolde and as Natural Parent and Legal Guardian of Adam Wolde and Wubit Wolde ..... Respondent,

v.

Lack's Beach Service, Inc., City of Myrtle Beach, and John Doe Lifeguard, Defendants,

Of which Lack's Beach Service is the ..... Petitioner,

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This Court should grant certiorari in this matter. This is a very large verdict that is unmoored to proper evidence, influenced by improper considerations, and which stands on legal error in several respects. The case originates with the lower courts' improper recognition of a duty of care that conflicts with applicable South Carolina statutory law under the circumstances here. The Court of Appeals' opinion affirming the verdict improperly overrides the contract duties between Lack's Beach Service ("Lack's") and the City of Myrtle Beach ("the City"), which contract was contemplated by statute. Additionally, certiorari is warranted to review and correct the lower courts' evidentiary rulings that conflict with controlling (and repeated) precedent from this Court. Finally, certiorari should be granted to address: (1) the jury's improper award of survival damages where there was insufficient evidence of conscious pain and suffering and reliance on the mortality tables in awarding damages for pain and suffering; (2) the trial court's erroneous review of punitive damages; and (3) the Court of Appeals' failure to state, if the verdict were affirmed, that on remand the trial court should determine the applicability of the caps under the S.C. Tort Claims Act.

I. The Court should grant certiorari to address the lower courts' erroneous recognition of a duty of care that conflicts with South Carolina law.

The existence of a duty is generally determined by the court as a matter of law. *Simmons v. Tuomey Reg'l Medical Ctr.*, 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000). If there is no duty, then there can be no liability. *See id.* "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003).

As Lack's has argued, the starting point for the analysis of duty here is that no lifeguards are legally required on any South Carolina beaches. This lack of required lifeguarding is

recognized by the General Assembly. S.C. Code Ann. § 5-7-145. Hence, ***no duty*** is owed regarding lifeguarding by anyone or to anyone at the baseline under any of the five categories of legal duties recognized by *Hendricks*. The General Assembly permits municipalities to provide lifeguards ***if they so choose***, either directly or ***through contracting*** with a private contractor. However, the statute does not impose any particular requirements for how lifeguarding services are to be provided and does not create any duty in and of itself.[1] Rather, the statute gives municipalities the discretion and oversight over how those services are to be provided, stating that "lifeguard personnel employed by the private beach safety company must be tested and certified ***as required by the municipality***." (emphasis added). S.C. Code Ann. § 5-7-145(B)(3).

Since, in this area, the General Assembly expressly provides that lifeguarding is ***not*** required, but specifically contemplates a municipality's ability to contract with a private company pursuant to the "requirements" of that municipality for lifeguarding, any duty that is subsequently created necessarily arises from, and only from, that city's contractual requirements. Here, the applicable contract was the Franchise Agreement between the City of Myrtle Beach and Lack's.

The lower courts overlooked this critical point. Here, Lack's agreed to provide lifeguarding services pursuant to its duties under the Franchise Agreement, but ***only*** assumed the

[1] The public duty rule "presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public," and thus such "statutes create no duty of care towards individual members of the general public." *Summers v. Harrison Constr.*, 298 S.C. 451, 455-56, 381 S.E.2d 493, 496 (Ct. App. 1989). Absent language indicating an intent to create a special duty to particular individuals, a statute does not create a duty. *Scott v. McAlister*, 436 S.C. 324, 335, 871 S.E.2d 620, 626 (Ct. App. 2022).

Likewise, pursuant to the Recreational Use Statute, there is no duty to protect the users of public land from unreasonably dangerous conditions. *See Mena v. Lack's Beach Serv., Inc.*, No. 4:06-CV-2536-TLW, 2008 WL 8850813, at *2 (D.S.C. Apr. 16, 2008) (concluding that the City there owed the plaintiff "no duty of care to protect him, or warn him of, any dangers inherent in swimming in the Atlantic Ocean").

duties and obligations contemplated and defined by the Franchise Agreement. The lower courts superimposed on top of the Franchise Agreement "industry standards" for lifeguarding, which were ***not*** part of the Franchise Agreement, and regarding which Lack's ***had no duty***. Further, the Franchise Agreement expressly ***permitted*** what has been referred to in this case as the "dual role" arrangement where Lack's lifeguards were able to engage in some commercial sales (obviously, the sales activity could not interfere with the lifeguards' carrying out of their other duties under the Franchise Agreement, nor did they here). As Lack's detailed in the Petition, the City Manager testified at trial regarding the City's awareness and express approval of the "dual role" arrangement contemplated by the Franchise Agreement. (Trial Tr. at 633:12-20, 634:2-25; R. 775-776.)

The City's motion for summary judgment, which is part of the record, provided further context. As the City explained, it made a conscious decision to reject a single purpose lifeguard model prior to entering into the 2015 franchise agreement. (Mot. for Summ. J. p.4; R. 2028.) Although the City did not wish to employ its own lifeguards, it nevertheless explored the cost of transitioning to an in-house, single purpose model before opting not to make such a change. (*Id.* at 4-5; R. 2028-29.) The City Manager testified in his deposition that they opted to continue using Lack's because of its level of expertise and knowledge of the beach. (*Id.* at 5; R. 2029.) Lack's had an "excellent" safety record and forty years of experience." (*Id.*) Critically, the City **was aware** of the USLA's criticism of "dual role" lifeguards. (*Id.*) However, neither the Franchise Agreement nor applicable law required USLA certification, and the City opted not to transition away from the "dual role" arrangement. (*See id.*) Prior to approving the 2015 Franchise Agreement and 2018 Amendment, the City received input from the City Manager and the Beach Safety Committee and voted to approve it via ordinance during properly noticed public meetings.

(*Id.* at 6; R. 2030.) The City had the option to approve, modify, or deny the agreement, and ultimately approved it by majority vote.

The *Dorrell* case relied on by Respondent is not inconsistent. In *Dorrell*, a road contractor paved a shoulder on a road in a way that resulted in serious harm to the plaintiff driver. The contract there provided that the contractor would conduct its work in such a matter to provide for and ensure the safety and convenience of the traveling public. *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 319, 605 S.E.2d 12, 15 (2004). The contractor contended that it owed ***no legal duty*** because the driver was not in privity of contract and it performed its work on the shoulder pursuant to the contract, and the trial court granted summary judgment. The Supreme Court reversed, explaining that there were jury questions as to whether the contractor breached a duty, citing the contractual language and a general common law duty of care. *See id.* at 319-20, 605 S.E.2d at 15.

As this Court later explained, the *Dorrell* line of cases each involved homebuilders or road contractors who ***created a significant risk of physical injury*** to foreseeable users ***through their work***. *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 50, 644 S.E.2d 43, 47 (2007). Federal cases interpreting *Dorrell* have reached similar conclusions. *See, e.g., Allen v. Choice Hotels Int'l, Inc.*, 276 F. App'x 339, 343 (4th Cir. 2008).

This Court should grant certiorari to address the lower courts' holdings, which conflict with law detailed above. The trial court permitted, and the Court of Appeals affirmed, Respondent's framing at trial of the "dual role" ***arrangement itself*** as constituting a violation of a duty of care Lack's owed to Mr. Wolde. Expert testimony was improperly allowed on this topic, and argument improperly allowed numerous times, to attack the "dual role" arrangement as a bad idea or as fundamentally at odds with safety. Critically, there was no evidence that any lifeguard was engaging in commercial activities in any way that could have impacted the Wolde tragic

drowning event. There was no true link of "dual role" to the drowning, and instead the lower courts and jury were allowed to second-guess the General Assembly's statutory public policy choices and the City of Myrtle Beach's discretionary contract term decisions respecting the Franchise Agreement (those discretionary decisions being sanctioned by the General Assembly). Any duty owed here necessarily emanated from the contract, acknowledged by specific statute. Had the jury been properly performing its role regarding whether Lack's acts or omissions proximately caused the Wolde drowning, Respondent's speculations were insufficient to overcome the JNOV standard. *See Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013).[2] Instead, Respondent in effect argued to the jury that it should condemn the contractual arrangement between the City of Myrtle Beach and Lack's. But this was not the jury's proper role. This Court should thus grant certiorari, reverse, and order JNOV.

II. The Court should grant certiorari to address the insufficient evidence supporting proximate cause.

Respondent did not introduce any non-speculative evidence supporting that "dual role" lifeguards' actions or omissions actually had any impact on what happened to Mr. Wolde. The "dual role" related evidence fundamentally tainted and prejudiced the trial. Respondent was permitted to speculate that the Lack's lifeguards were "distracted" by having a dual purpose when, again, there was no credible evidence that any of the lifeguards were engaged in a commercial transaction at the time of the drowning incident.

None of Respondent's arguments to the contrary are availing. Respondent cites that employees could earn sales incentives and the testimony from their expert Dr. Griffiths and the

[2] At a minimum, a new trial absolute is warranted in which Respondent is not permitted to argue that the "dual role" arrangement itself breached any duty of care owed to Mr. Wolde.

USLA president that a "dual role" conflicted with the lifeguards' "primary role" of protecting at risk swimmers. Respondent was improperly permitted to use this testimony to overlay and impose greater duties on Lack's beyond those it actually had under the Franchise Agreement.

The lower courts improperly approved of Respondent's reliance on "dual role" evidence to support proximate cause where there was no evidence supporting that "dual role" had any impact on what was occurring on the beach at the time Mr. Wolde drowned. Respondent first cites the ***daily*** lifeguard stand revenues, which in no way supported that commercial transactions were being conducted during the less than 10 to 15-minute duration (acknowledged to be the maximum duration of Mr. Wolde's initial struggling and drowning by Respondent) of the incident. Respondent's contention that the daily stand revenues constituted circumstantial evidence that the lifeguards in the area may have been distracted during this time period is pure speculation. The approximately $1,100 in total sales between stands L-20, L-21, and L-22 over the course of many hours is not evidence, nor does it create any reasonable inference, that any lifeguard was actually engaged in a commercial transaction at the time of the drowning. And despite Respondent's suggestion to the contrary, Lack's did not "misrepresent" what the Court of Appeals said about the sales data; the Court of Appeals ***did*** state that: "we agree that the admission of the evidence was arguably error due its broad scope."

Further, the fact that a lifeguard was conversing with a beachgoer 5 to 10 minutes prior to the incident also fails to support any verdict. The lifeguards were expected to engage in other safety efforts such as explaining the flag system, which is what Lifeguard L-22 stated he was doing

at the time of the incident. (Trial Tr. 823:25-824:3; Def.'s Ex. 7, Stmt. of Lukasz Jaworski; R. 965-66, 2268.)[3]

Respondent's contentions that Lack's violations of the terms of the Franchise Agreement support the jury's finding of proximate cause are without merit. First, Respondent contends there was insufficient training of lifeguards. However, Respondent again utilizes the testimony of the USLA official to overlay requirements beyond what the Franchise Agreement required. There was extensive evidence and testimony regarding the training that Lack's lifeguards underwent[4] and, regardless, there is nothing in the record supporting that additional training of Lack's lifeguards would have, or even could have, prevented the incident that occurred with Mr. Wolde.

Second, Respondent cites the Franchise Agreement's requirement that Lack's have a certain number of "lifeguard onlys"[5] on duty. Admittedly, there was one less "lifeguard only" on duty on the day of the drowning than the Franchise Agreement contemplated. This was due to the lifeguard only unexpectedly calling in sick. (Trial Tr. 361:17-362:6; R. 503-04). However, it was entirely speculative to assume that this "lifeguard only," had they not called in sick, would have been anywhere near the vicinity of the incident, since these lifeguard onlys covered a multi-block territory and had no set schedule for where they would be, or when. (Trial Tr. 445:1-446:16,

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[3] Respondent also criticizes the "lunch procedure" within the Franchise Agreement, where neighboring stand lifeguards would scan the sector while an adjacent guard was on their lunch break, but this criticism suffers from the same deficiency as the improper criticism of the "dual role" arrangement generally, since it was contemplated by the Franchise Agreement and, therefore, approved of by the City. The jury should not have been allowed to second-guess these contract terms or policy choices by the City or by the General Assembly, and then impose liability on Lack's.

[4] *See* Trial Tr. 723:14-18, 725:1-726:7, 804:16-21, 808:11-14, 809:9-20, 810:8-811-3, 834:8-22; R. 865, 867-68, 946, 950, 951, 952-53, 976.

[5] Again, a "lifeguard only" was a lifeguard who was not allowed to engage in any commercial activities. The presence of such "lifeguard onlys" in the Franchise Agreement clearly demonstrates that the other lifeguards ***were*** allowed to engage in commercial activities.

696:10-16; R. 587-88, 838.) As Respondent acknowledges, the "lifeguard only" who was unable to come to work was expected to be posted between towers L-23 and L-24 (whereas this incident occurred near tower L-21). (*See* Lack's Lineup for 8/24/2018; R. 2159.) Regardless, the missing lifeguard only, standing alone, was simply not proven to be the proximate cause of Mr. Wolde's sudden drowning in an unpredictable rip current despite Respondent's pure speculation otherwise.

Finally, Respondent contends that Lack's should have closed the beach or provided additional warnings. Here again, this contention rests on speculation. The only record evidence was that Lack's received a weather report highlighting the ***potential*** for hazardous conditions due to the presence of a longshore current and possibility of rip currents. (Trial Tr. 711:6-15; R. 853.) However, the risk would depend on the wind, condition, and if it was low or high tide. (*Id.*) There was no evidence that this report identified any active rip currents or that any Lack's personnel (or anyone else on the beach that day for that matter) saw a rip current prior to the incident with Mr. Wolde. Moreover, Respondent overlooks that Lack's appropriately posted red flags to warn of conditions and imposed a waist-deep limit for swimming. (*Id.* at 727:5-21; R. 869.)

The Court should grant certiorari to address these errors, reverse, and order JNOV.

III. Certiorari is warranted due to the lack of evidence supporting conscious pain and suffering and the jury's reliance on the mortality tables for its survival verdict.

The lower courts erred in their findings that there was sufficient evidence of conscious pain and suffering to justify the survival damages award. The duration, location, and movement of rip currents are all unpredictable. (Trial Tr. 433:1-16; R. 575.) One may arise and subside with another appearing shortly thereafter in a different location. (Trial Tr. 433:17-22; R. 575.) There was no evidence or testimony supporting that anyone identified a rip current, at any time, the day of the drowning prior to the Wolde incident. Respondent's contention that Lack's could have

prevented the genesis of the incident (Mr. Wolde and his children entering the water to swim and suddenly getting swept up in a previously unidentified rip current) is specious. Therefore, as Lack's asserted, the jury should only have considered whether Mr. Wolde's struggle and drowning could be attributed to Lack's negligent acts or omissions, and whether Mr. Wolde suffered conscious pain and suffering as a result. As stated above, there was no evidence of proximate cause sufficient to go to the jury. Further, the trial court compounded its errors by allowing the jury to speculate on conscious pain and suffering in the absence of any expert testimony.

The trial court and Court of Appeals also erred by failing to reverse in light of the jury's reliance on the mortality tables for its survival claim verdict. Lack's argument did not contend that the verdict was a facially defective or inconsistent verdict, and thus its argument was not one that had to be addressed prior to the jury's discharge. Rather, Lack's raised the standard post-trial issue of whether the jury's verdict was based on evidence of actual pain and suffering. It wasn't. It was instead improperly based on the mortality tables. Contrary to the Court of Appeals' statement at Opinion p. 20 n.8, Lack's preserved this issue because it obtained a ruling from the trial court, rejecting this argument. (*See* Order; R. 28.) A motion to reconsider was not required since the trial court rejected all of Lack's arguments about the jury's use of the mortality tables.

These additional grounds further support that the trial court erred by failing to grant JNOV on the survival claim. The Court should thus grant certiorari to address these errors.

IV. Certiorari is also needed to address the dearth of evidence supporting recklessness.

Here, again, Respondent relies on the evidence and testimony attacking the "dual role" lifeguarding (Lack's correspondence with the USLA) to support the jury's finding that Lack's was reckless. However, Respondent seeks to impose a duty of care over and above the duty created by the contract between Lack's and the City of Myrtle Beach. As detailed above, the City was well

aware of how Lack's operated and chose to continue that structure in light of Lack's long service to the City and excellent safety record. Respondent should not have been permitted to use this improper evidence to support negligence, much less recklessness. Lack's operated how it was authorized and performed its duties in the way that the City expected it to do. This is the opposite of recklessness and thus cannot, as a matter of law, support the jury's punitive damages award. The Court should thus grant certiorari to address the lower courts' errors.

V. The Court should grant certiorari and order a new trial absolute in light of the trial court's evidentiary errors conflicting with applicable South Carolina precedent.

The trial court's admission of the daily, monthly, and yearly gross sales revenue data for Lack's during the actual damages stage directly conflicts with this Court's holdings in *Branham v. Ford Motor Corp*. 390 S.C. 203, 701 S.E.2d 5 (2010) and *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 646 (2012) that such information is misleading, confusing and unduly prejudicial. The Court of Appeals acknowledged as much with its statement that it was arguably error to admit this evidence in light of its "broad scope." Opinion p. 14. This issue alone necessitates this Court's attention to address the conflict between the Opinion and *Branham*/*Sulton*.

Respondent contends this evidence was admissible to prove that Lack's "dual role" system created a dangerous conflict in the lifeguards' duties. But this was ***not*** an appropriate consideration for the jury, for the reasons stated above. Moreover, whether the data was contained in a public record or evidence of a pattern or practice does not mean it was relevant evidence or that its probative value outweighed the danger of unfair prejudice. If the sales data actually showed that a lifeguard in the vicinity of Mr. Wolde was engaged in a commercial transaction at the time of his drowning, then perhaps it might have been a proper consideration for the jury. However, what

occurred here was a crusade by Respondent against the ***approved*** "dual role" contract arrangement between Lack's and the City of Myrtle Beach, and Lack's "for profit" business, to give the jury a reason to hand down a verdict based on Lack's gross sales from the dual role arrangement, rather than on proper evidence (some of the very concerns that *Branham* and *Sulton* raised).

Further, Respondent's arguments regarding the propriety of the workers' compensation order and their use of it to "impeach" George Lack are also unavailing. The subject order concerned arguments of counsel made in briefing from 15 years earlier in a dispute involving the workers' compensation insurance premiums for a different company (Lack's Outdoor Furniture). It was improper for the Court to allow impeachment with this document. This was especially so since, as Lack's has noted, the statements were not even inconsistent. The argument in the workers' compensation briefing Lack's made was addressing the subject risk, not the job duties and expectations of lifeguards generally about which Mr. Lack spoke at trial. As Lack's explained in the administrative law court proceedings, since the lifeguards were only actively engaged in dangerous activities such as water rescues a very small percentage of the time, the "loss risk by the (worker's compensation) carrier is extremely small." *See Lack's Outdoor Furniture, Inc., Appellant*, No. 01-ALJ-09-0374-AP, 2002 WL 385121, at *5 (Feb. 20, 2002). Lack's suffered significant prejudice as a result of this improper impeachment and the admission of this irrelevant insurance proceeding evidence.

Finally, the admission of the USLA correspondence was also prejudicial error warranting a new trial, and this Court should grant certiorari to address this error. This evidence also tied to Respondent's theme that Lack's "dual role" arrangement with some lifeguards was a violation of the standard of care and was thus improper. Although Respondent calls Lack's argument "incredulous," the USLA's criticism of the "dual role" simply has no bearing on any duty owed

by Lack's to Respondent. The City was aware of the arrangement that it chose and declined to modify it despite its awareness of the USLA's criticism. This argument is not, as claimed by Respondent, a "red herring." What the Franchise Agreement required was for the lifeguards to "***complete a course*** consisting of a total of not less than 40 hours in open water life saving which meet the ***criteria*** of the United States Lifeguard Association." Lack's developed training in accordance with those standards and this was reported to the City as required by the Franchise Agreement. (*See* Trial Tr. 439:8-15, 440:19-441:13 (explaining that Duke Brown of Lack's Beach Service is a certification agent for the USLA and provided the training outline for Lack's as well as daily training and assistance); R. 581-82.). Here, again, the USLA correspondence evidence led to a jury verdict based on passion and prejudice.

Lack's recognizes that evidentiary matters are, in general, within the discretion of the trial judge. Yet this Court has handed down precedents regarding evidentiary matters in the past, because it knows those matters can dramatically affect trials and lead to improper verdicts. This Court's *Branham* and *Sulton* cases cannot be ignored, nor can supposed exceptions be allowed to swallow the clear holdings of those precedents. The Court should grant certiorari to address all of these evidentiary errors.

VI. Certiorari is necessary to address the trial court's error in bifurcating the trial and the excessiveness of the wrongful death verdict, both of which warrant a new trial.

Both of these grounds were preserved. As Lack's contended at trial, the verdict form asked the jury to make a finding regarding recklessness in a vacuum without any explanation for the ramifications for such a finding. The court should have either withheld any finding of recklessness until the punitive damages stage or explained to the jury why it was to answer that question in the first phase and what would happen if it found Lack's was reckless. Lack's has consistently argued

that the punitive damages statute itself justifies the instruction that it requested regarding a second phase of the trial, and thus Lack's did not "consent" to the issue of recklessness being determined in the first stage without the requested explanatory charge, (*see* Tr. 838:24-869:2, 868:17-23; R.980-1011), as the Court of Appeals held. This issue is preserved and necessitates a new trial.

Lack's argument regarding the wrongful death award was also properly preserved as it consistently raised the fact that the jury's $10 million award for wrongful death damages was considerably higher than even the $8.1 million suggested by Respondent's counsel. Although Lack's is not aware of any South Carolina case law holding that an award higher than counsel's suggestion is excessive as a matter of law, that has never been Lack's argument. Rather, Lack's cited this as yet another example of how the jury's award was driven by passion and prejudice rather than the record evidence. The jury awarded $3.73 million in survival damages despite no evidence of conscious pain and suffering, nearly $2 million more in wrongful death damages than what counsel suggested, and an additional $7 million of punitive damages on top of that despite the testimony and evidence supporting that Lack's had a negative net worth.

These issues demonstrate the necessity of a new trial, and the Court should grant certiorari to address them.

VII. The trial court erred in its due process review of punitive damages and failure to apply the mandatory statutory factors, and this Court should grant certiorari to address these errors.

Contrary to the Court of Appeals' finding, this argument was expressly preserved. Although there is some overlap between the statutory factors and the common law *Mitchell* and *Gamble* factors, they are not coextensive, and the statutory factors are more detailed. *See* S.C. Code Ann. § 15-32-520(E)-(F). Relevant here, the "severity of the harm" statutory factor requires that the harm be "***caused by the Defendant***." Moreover, the statute requires an examination of

whether the plaintiff's' ***"own conduct"*** contributed to his injury, and this language does not require that the conduct rise to the level of negligence. The evidence here showed that Mr. Wolde voluntarily entered the ocean with his children, continued into deeper water and that he did not swim in a manner to escape the rip current. Additionally, there is no evidence that Lack's profited from any alleged conduct that had a causative relationship to the incident involving Mr. Wolde in any way. The trial court thus erred by failing to consider the mandatory statutory factors.

Moreover, certiorari is warranted to address the trial court's errors in its application of the *Mitchell* and *Gamble* factors. Lack's argument that there was insufficient evidence of reprehensibility is far from "outrageous" considering Respondent's primary justification for the award, which with the trial court agreed, regarded the "dual role" system that the City chose to use and approved of through the Franchise Agreement. Although the ratio of punitive damages was less than 1:1, this ratio cannot be used to justify excessive punitive damages when the actual damages award is itself excessive. Finally, there are no comparable civil penalties here since this was simply an accident. Certiorari is also necessary to correct these errors.

VIII. Lack's conditional motion to reduce the judgment remains ripe for disposition.

Lack's position has consistently been that this motion remains pending and ripe for disposition because it was contingent on the resolution of the other post-trial motions and appeal of the same. If the trial court had granted one or more of Lack's motions (for example, by granting JNOV or a new trial absolute), it would have mooted the need to address the applicability of the S.C. Tort Claims Act caps. This Court may still reverse and remand for entry of JNOV or a new trial absolute. However, if the verdict is affirmed, then whether the Tort Claims Act caps apply becomes ripe for consideration. The Court should grant certiorari and expressly confirm that the trial court can and should address this issue if necessary.

Regarding the merits, the applicability of derivative sovereign immunity is an important, unanswered question of law that our appellate courts have not addressed. Contrary to Respondent's assertion in the Return, although the Franchise Agreement is a contract between the City and Lack's, it does not provide that the parties' relationship is an independent contractor relationship. Therefore, S.C. Code Ann. § 15-78-30(c) is not dispositive. As the analogous authorities cited by Lack's detail, the applicability of this doctrine is well recognized in the federal courts and by several states. The trial court should have the opportunity to analyze its applicability here. This issue was unaddressed by the Court of Appeals in its opinion.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari and Lack's prior briefing, the Court should grant certiorari, reverse the judgment of the trial court, and remand for entry judgment in favor of Appellant Lack's Beach Service. Failing this, the Court should grant certiorari, reverse, and remand for a new trial absolute. Failing all of that, the Court should grant certiorari and remand to the trial court to address Lack's conditional motion regarding the caps and the motion to amend to plead the caps.

Signature on Following Page

Respectfully submitted,

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